Petition

81-1743

No.

Supreme Court, U.S.
FILED
MAR 18 1982
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

VICTOR SCHROEDER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Defendant's Sixth Amendment Right to Counsel was denied when he was forced to trial without counsel, about six months after indictment, without his choosing to represent himself because of ignorance of legal procedures, and when he actually did locate counsel of his choice in whom he had confidence, prior to the deadline for filing the appellant's brief with the Court of Appeals.

II. Whether Defendant's Fifth Amendment Right against Self-Incrimination, and his Right to a Fair Trial, were denied or abridged by the use of his 1979 civil deposition as evidence in his 1981 criminal trial; that is,

whether the defendant had knowingly, intelligently, and voluntarily made inculpatory statements of a criminal nature when, on advice of counsel at a civil deposition, he made certain damaging admissions; or, in other words,

whether, if defendant had had counsel at the criminal trial, the reading to the jury of this civil deposition would have been prevented on the ground that he had not been given a Miranda-type warning prior to his civil deposition which was based upon the same facts as this related criminal case.

III. Whether the defendant got a fair trial because, as a purported member of an organization known as the Posse Comitatus, he was selectively prosecuted and made an example.

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A REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF ANY OPINIONS DELIVERED IN THE COURTS BELOW

OPINIONS BELOW

On March 18, 1981, sentence was imposed upon Defendant-Petitioner, Victor Schroeder after a verdict of guilty by the jury. On January 20, 1982, the Seventh Circuit Court of Appeals of the United States Affirmed on all points.

Three Orders were entered by a U. S. Magistrate on August 22nd, September 10th, and October 17th, 1980; three orders were entered by the District Judge on November 4th and 12th and December 8, 1980. The Final Pretrial Conference Order was dated December 30, 1980. The Verdict of Guilty on all three counts was rendered by the Jury on January 9, 1981.

JURISDICTION

The jurisdiction of the United States Supreme Court to grant a Writ of Certiorari to review the Opinion of the Seventh Circuit Court of Appeals and the Judgment of Conviction of the District Court for the Western District of Wisconsin is believed to be based upon Title 28 United States Code, sections 1254(1) and 1651(a).

THE CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

United States Constitution

5th Amendment Right against Self-Incrimination, and Right to a Fair Trial and

Right against Deprivation of Liberty without Due Process:

> "No person shall be held to answer for a capital or otherwise infamous crime, . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. . . ."

6th Amendment Right:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district . . . and to have the Assistance of Counsel for his defense."

Statutes

Texts of 18 U.S.C. § 1014 and 28 U.S.C. § 1254(a)(1) and § 1651(a) are set forth at the end of the Appendix.

STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

The Defendant, VICTOR SCHROEDER, was indicted and convicted of making a false statement to a bank in a loan application in violation of 18 USC 1014; and he has been sentenced to 3 years imprisonment.

Virtually his entire life has been spent in farming and related activities. He has five grown sons who have also engaged in farming activities, also in Columbia County, Wisconsin. Bank financing of farming activities is a common practice. His loan which is the subject matter of this criminal case was through the federal Production Credit Association, which has, meanwhile taken possession of the 320-acre farm and buildings by placing armed guards in the farmhouse, one of whom assaulted a Schroeder son at the latter's residence, more than three miles away. PCA bid $320,000 at the sheriff's sale but has not, according to the latest information, paid any of the bid to the holder of the first mortgage, the Federal Land Bank of St. Paul. This recent loss of the family farm caused great grief to the entire family of this conscientious, hard-working, otherwise law-abiding life-long farmer of the type upon whose efforts the mass of city-dwellers depend; and the efficiency of such individual, independent farmers is the envy of the rest of the world.

Appellant had also been actively engaged in a series of civil cases arising out of the same set of facts, namely,

79 CV 1909 PCA v. Schroeder, et al.
80 CV 2055 PCA v. Schroeder, et al.
81 CV 2468 Lodi State Bank v. Schroeder, et al.; and
79 CV 1959 Arlington State Bank v. Schroeder, et al."

Each of these cases is pending or on appeal in various Wisconsin State courts. Each of these cases were instituted on a civil basis by parties who later moved to institute these criminal proceedings and testified as Government witnesses in an effort to gain advantage over this litigant in the civil matters enumerated above.

A federal civil suit is now pending, charging Production Credit Association and others with conspiring to wrongfully deprive Victor Schroeder of his property and liberty, by abuse of process and malicious prosecution, for the alleged purpose of transferring his farm to a former officer of PCA, who presently operates a hog-farm himself in the same vicinity.

This criminal proceeding was initiated on June 29, 1980 with an indictment charging defendant-appellant with a 3-count violation of 18 USC 1014; and he was arrested for said offense on August 8, 1980. Over objection and protest timely filed, he was exposed to a 4-day Jury Trial, although insisting he wanted no jury; and he was forced to go to trial without Counsel, beginning January 5, 1981. Defendant had waived his right to a Jury Trial and made clear that he was choosing a Bench Trial. Despite that, the judge forced a jury upon him. Also, he had never stated that he wished to represent himself, stating on various occasions that he was seeking counsel of his own choice. He tried to make clear his insistence that no attorney practicing only in Wisconsin would be of his choice, because of the powerful influence of Production Credit in Wisconsin.

Mr. Schroeder was convicted by the jury on all three counts; and sentence was imposed on March 18, 1981, providing for 18 months imprisonment, consecutively, on Counts I and II, with Count III to run concurrently,

for a total of three years. The judge stated at time of sentencing that he was making an example to other farmers borrowing from PCA.

During the trial and until February 20, 1981, the defendant was without any counsel. He then requested appointment of counsel for the sentencing procedure; and on that date, the Court appointed Earl Munson, Jr., of the firm of LaFollette, Sinykin, Anderson & Munson, to represent the defendant "only for proceedings in district court, and not any appeal."

The Federal Land Bank Association is in the business of assisting farmers by lending them money to purchase and maintain farmland and farm homes, pursuant to federal statute. That association has a first mortgage with Defendant, and it had always been kept current.

The Production Credit Association is in the business of assisting farmers by lending them money to purchase farm machinery and equipment, livestock, fertilizer and other products used in the production of farm products such as grain and meat. PCA like FLB is an association formed pursuant to federal statute with the Congressional intent of assisting farmers to supply the nation's food. PCA of Madison insisted that Defendant sign a Real Estate Second Mortgage on his farmland, despite the fact that the Farm Credit Act grants authority to only Federal Land Banks to take real estate mortgages as collateral.

Over the years, loans have been made by the two associations to the defendant in excess, at any one time, of $750,000. To obtain or renew a loan, he would meet with a representative of a lender, tell them what equipment and livestock he had, and what the prospects were at harvest time. They would decide between them what his needs were for financing and give him the necessary line of credit. The lender would prepare the financial statement and Victor would sign it. The most recent loan application with PCA was signed under the circumstances that

two representatives of PCA brought the form to the Schroeder's country kitchen and demanded that he sign it. When he glanced at the figures and wanted to study it further, one of them pounded on the table and told him that he must sign it regardless of the figures, which he did, feeling obliged to do so. He is an expert farmer but has only a grade-school education.

After thereby renewing his loan with PCA, he borrowed relatively small amounts from local banks also. Never in all those years had PCA attempted to verify his listing of farm machinery or number of hogs. In fact, in the specific column on the PCA forms calling for Serial Numbers of equipment such as tractors and every other item having serial numbers, these were left blank by PCA.

When Victor in early 1979 applied for a loan from Arlington National Bank, then for the first time, a lender sent someone to check and verify his financial statement. All together, representatives from the Arlington Bank, the Lodi Bank and PCA descended on the farm. at which time they discovered that the amounts shown for equipment and livestock appeared to be excessive. The valuation of the farmland, however, had not been adjusted for inflation or accurate appraisal, the net result being that his net worth as shown was actually greater than what was listed on the loan applications.

Starting in 1979 PCA has filed various civil suits not only against Victor and Evelyn but against their sons who operate their own separate farms. These suits have led to the sale of all of Victor's machinery and livestock and loss of possession of his farm to PCA as aforesaid. Besides that, a judgment was entered against some of his sons and in favor of PCA, for tens of thousands of dollars, even though none of the sons ever entered into any contract or loan with PCA.

Victor was arrested in August 1980. He told the judge that he could have confidence only in an attorney who did not actively practice in the Wisconsin courts because

he believes that the PCA is so powerful in rural Wisconsin that no such lawyer would want to oppose them. He had heard there was an Illinois attorney with a Wisconsin license who might take on such a case, but he was unable to locate his present counsel until about two days before the appeal brief deadline. The case went to trial in January 1981; at all times, Victor made it clear that he did not want to represent himself, nor did he want a jury.

THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The United States District Court for the Western District of Wisconsin had jurisdiction to try the defendant on the criminal charge that he had violated section 1014 of the Criminal Code.

REASONS TO GRANT THE WRIT OF CERTIORARI

The Opinion of the United States Court of Appeals, i.e., the Unpublished Order of January 20, 1982, summarized facts of the case to be as follows:

> "Victor Schroeder used to own and operate a 320-acre hog farm near Lodi, Wisconsin. For almost twenty years he obtained the capital he needed by making loans secured by his land, equipment, and livestock from the federally chartered Production Credit Association (PCA) and individual banks. Beginning in 1979, everything came unstuck. First the lenders filed various civil suits against Mr. Schroeder which ultimately resulted in a sheriff's sale of his farm, machinery, and livestock."

The Court of Appeals then summarized the procedure as follows:

> "In July of 1980 a federal grand jury indicted Mr. Schroeder on three counts of making false statements to lending institutions, in violation of 18 U.S.C. § 1014 (1976).* A jury convicted Mr. Schroeder on all counts in early 1981, and Judge Doyle sentenced him to three year's imprisonment."

I.

The Defendant's Sixth Amendment Right To Counsel Was Violated When He Was Forced To Trial Without Counsel, About Six Months After Indictment, Without His Choosing To Represent Himself, Because Of Ignorance Of Legal Procedures, And When He Actually Did Locate A Counsel Of His Choice In Whom He Had Confidence, Prior To The Deadline For Filing The Appellant's Brief With The Court Of Appeals.

It is well settled that a criminal defendant in Victor Schroeder's position has a constitutional right to the assistance of counsel and that a lawyer will be appointed at the government's expense if the defendant cannot afford to hire one. Here the problem was that Mr. Schroeder did not want appointed counsel; because, with the help of his five adult sons, he was able to retain counsel of his choice in whom he had confidence. He wanted to be represented by someone who had the expertise of a lawyer but was not a part of the Wisconsin Bar in the sense that he would not be a lawyer actively practicing in Wisconsin where the Production Credit Associations are held in high esteem by the legal profession. Although the type of lawyer he was seeking would not be actively practicing in Wisconsin, he would be a member of the organized bar of another State. Such a person, whom Mr. Schroeder did finally find on the day before his appellant's brief was due in the U. S. Court of Appeals in Chicago (and who is preparing this petition), could have represented him at the trial and have saved everyone time and expense.

There was no emergency or urgency which required Judge Doyle to force the defendant to be tried without counsel, and with no desire or ability to act as his own counsel, and to do so six months after indictment when other courts have found as much as three years not an unreasonable time to postpone trial until satisfactory counsel was found. Although the Court of Appeals has relied

upon a psychiatrist's finding "that Mr. Schroeder was competent to stand trial and as capable as others of comparable intelligence and education of representing himself", that is meaningless when no farmer with only an eighth grade education is capable of adequately representing himself in a federal criminal case, and when he had made it abundantly clear that he had no desire or ability to represent himself. When the Court of Appeals further reasoned that "Judge Doyle made efforts to explain the proceedings to Mr. Schroeder", the very wording of that observation makes it implicit that efforts were necessary to explain the proceedings. Although the Opinion below comments that the trial judge had "allowed him to have several friends at the defense table during trial", this counsel knows of no precedent for a criminal defendant who wants to be represented by counsel of his choice, being given instead the assistance of laymen friends and thereby having achieved a fair trial with competent counsel.

The Court of Appeals Opinion is inconsistent; because, on the one hand its Opinion reasons that "several friends at the defense table during trial" was adequate representation of counsel, whereas the Opinion had earlier held that (p. 2) "someone who had the expertise of a lawyer but was not a member of the organized bar . . . could not represent Mr. Schroeder." Judge Doyle had not been justified in going ahead with the trial because there was no basis for an understanding that Mr. Schroeder had waived his right to be represented by counsel. Quite the contrary, he had consistently and continuously, orally and in writing, repeated that he insisted on having "counsel of his own choice in whom he had confidence".

How the Seventh Circuit Court of Appeals was able to conclude, "We cannot say that Judge Doyle was wrong when he concluded that five months was long enough" to seek such a counsel is baffling if not incomprehensible; be-

cause at the beginning of that same short paragraph on page 3 of the Opinion, the Court of Appeals introduces the subject-matter of that paragraph with—

> "Mr. Schroeder's conduct of his own defense was a disaster. He was disorganized and ill-prepared. He was unfamiliar with the rules of evidence. And he offered highly idiosyncratic theories to defend himself—for example, that he was somehow not liable because the loans to him had not been made in Federal Reserve Notes or silver dollars. But the injury was self-inflicted."

The United States Supreme Court held in *Scott* v. *Illinois,* 440 U.S. 367, and reaffirmed in *Baldasar* v. *Illinois,* 446 U.S. 222 (1980), that

> "the Sixth and Fourteenth Amendments to the United States *Constitution* require that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."

An issue in this case is whether the defendant not only was entitled to the assistance of appointed counsel, but also was entitled to assistance of counsel of his own choice in whom he had confidence.

Possibly the Government will argue that, since the Court did allow this defendant to occasionally confer with two laymen, this gave him counsel of his choice; but the Supreme Court well recognizes, "Even the intelligent and educated layman has small and sometimes no skill in the science of law", *United States* v. *Henry,* 447 U.S. 264, 292.

"More recently this Court has again observed that the concerns underlying the Sixth Amendment right to counsel are to provide aid to the layman in arguing the law in coping with intricate legal procedure, *United States* v. *Ash,* 413 U.S. 300, 307-308 (1973), and to minimize the imbalance in the adversary system that otherwise resulted with the creation of the professional prosecuting official. *Id.,* at 308, 309."

The last witness for the Government and for PCA was PCA's former vice-president, Sheldon Schieldt, who testified:

> "Q. And how did you come to meet Mr. Schroeder?
> A. I went out with Bruce Thompson to his farm to check collateral the first time I met him. . . . I believe that was in June of 1979. . . . The first visit was just Bruce Thompson and myself. (168, 3-9) . . . We wanted to see if we could find out the cause for his troubles so that we could correct it or try to correct it with him" (Tr. 168, 15-17)

That was the purpose for Congress setting up PCA. This witness also testified,

> "He indicated that day that we took that statement that he had six trucks. It was in the morning, and in the afternoon Bruce Thompson checked with the Motor Vehicle Department and he had eight trucks" (171, 16-20)

Thus endeth the testimony upon which this ruined man was convicted.

The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to have Assistance of Counsel for his defense. The instant case raises the issue of whether he is entitled to have assistance of counsel of his choice. Was this defendant, who did not choose to proceed pro se, although he had rejected appointed counsel which was not of his choice, denied a fundamental and essential element of a fair trial?

As stated in a concurring opinion in the *Baldasar* case,

> "In *Argersinger* v. *Hamlin*, 407 U.S. 37 (1972), we rejected the suggestion that the right to counsel applied only to r ıpetty offenses where the accused had a right to a jury trial, and held that '*no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial.*' (emphasis added)."

As discussed further in *Baldasar,* the U. S. Supreme Court took the case for consideration, even though it involved

only a "conviction for shoplifting three packages of bacon". In the instant case, however, Defendant Schroeder had spent his lifetime farming, raising hogs from which the bacon was made; he had never been charged with anything before, even a traffic offense. The High Court had reasoned in the *Scott* case "that counsel was required because Argersinger had been imprisoned as a result of the prosecution" and that Scott had "expressed the limit to the right to counsel." (p. 226)

Continuing,

> "In the Court's view, *Argersinger* rested primarily on the conclusion 'that incarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense'."
>
> "We should not lose sight of the underlying rationale of *Argersinger*, that unless an accused has 'the guiding hand of counsel at every step in the proceedings against him,' *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932), his conviction is not sufficiently reliable to support the severe sanction of imprisonment. . . . (A) rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a prison term collaterally, would be an illogical and unworkable deviation from our previous cases. (pp. 228-9)"

The *Powell* case referred to in the above *Baldasar* Opinion had this to say, back in 1932, about the right to counsel of one's own choice:

> "It is hardly necessary to say that, the right to counsel being conceded, *a defendant should be afforded a fair opportunity to secure* COUNSEL OF HIS OWN CHOICE." (287 U.S. 45, 53; emphasis added)

Since *Powell* changed the law to comply with the constitutional right to counsel, there have been numerous cases referring to the right to appointed counsel; there has been a dearth of cases, however, referring to "counsel of his own choice". Defendant was advised by some laymen

friends that they believed he had a right to counsel of his own choice, and he made that demand over and over to the trial Court.

The most recent case on this subject, found by appellant's counsel, is the 1981 case of *Ford* v. *Parratt*, 638 F.2d 1115:

> "For over fifteen years, it has been clear beyond doubt that a defendant pleading guilty to a felony charge has a federal constitutional right to the assistance of counsel (p. 1117). . . . Furthermore, . . . since the days of the Scottsboro boys' rape case, *Powell* v. *Alabama*, 287 U.S. 45 . . ., it has also been accepted that a state defendant has a right not only to the timely appointment of counsel but also to the assistance of counsel whose quality of performance does not fall below a minimum level of effectiveness." "(O)rdinarily a reasonably competent attorney will conduct an in-depth investigation of the case which includes an independent interviewing of the witnesses. . . .
>
> "There is nothing in the record that indicates that the appellant's attorney engaged in *any* investigation. . . . We have long required that counsel be afforded the opportunity and in fact 'make such *preparations for the arraignment* and trial as the facts of the case fairly demand. . . . Here, counsel's failure to investigate . . . constitutes failure to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances.'"

Perhaps the constitutional guarantee to counsel of one's choice, in a felony case, is best enunciated and summarized in the footnote at page 293 of *Henry*:

> "The English common-law rule, which severely limited the right of a person accused of a felony to consult with counsel, was apparently rejected by the Framers [of our Constitution] as inherently irrational."

Its application to this defendant at his trial was likewise INHERENTLY IRRATIONAL.

II.

Defendant's Fifth Amendment Right Against Self-Incrimination, And His Right To A Fair Trial, Were Denied Or Abridged By The Use Of His 1979 Civil Deposition As Evidence In His 1981 Criminal Trial; That Is,

The Defendant Had Not Knowingly, Intelligently, Or Voluntarily Made Inculpatory Statements Of A Criminal Nature When, On Advice Of Counsel At A Civil Deposition, He Made Certain Damaging Admissions; Or, In Other Words,

If Defendant Had Had Counsel At The Criminal Trial, The Reading To The Jury Of His Civil Deposition Would Have Been Prevented On The Ground That He Had Not Been Given A Miranda-Type Warning Prior To His Civil Deposition Which Was Based Upon The Same Facts As This Related Criminal Case.

In the *Baldasar* case, *supra*,

> "the indigent petitioner, after his conviction of petit larceny, was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense (446 U.S. 222, 224)."

In the instant, Schroeder case, the indigent defendant was sentenced to imprisonment only because he had been subjected to various civil cases by Production Credit Association, in one of which he made statements which were quoted at length in this criminal trial as statements purportedly showing his admission, without prior Fifth Amendment warning, of his culpability regarding false loan applications.

An issue in this case is whether the Government deliberately elicited information from defendant in violation of the rule of *Massiah* v. *United States*, 377 U.S. 201 (1964) and *Brewer* v. *Williams*, 430 U.S. 387 (1977), just as that was a question in *United States* v. *Henry*, 447 U.S. 264, 275. Production Credit Association of Madison is an

agency set up by the Government, purportedly to assist farmers with credit for the purchase of livestock and farm machinery. Production Credit (hereafter PCA) filed various civil suits against this defendant and other members of his family, apparently as part of a scheme to make him an example for all other farmers in the area, so that they would be afraid to oppose PCA in any way. In one such suit, PCA representatives obtained admissions from this defendant, without any warning that they might be used in this later criminal prosecution. Without extensive quotations from the transcript of that civil case, which would not have been allowed if he had had counsel, it is highly likely that he would have been acquitted by the jury. Officials of PCA sat throughout this criminal trial and, according to defendant, conferred frequently with the excluded witnesses before they were called to testify.

Just as, "in *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966), this Court noted the powerful inducements to reach for aid when a person is in confinement," as stated in *United States* v. *Henry*, (*supra*), so too when Victor Schroeder, an unschooled life-time farmer was confronted at a deposition with the possibility of having all his production credit cancelled by PCA if he did not give the answers they sought, he was under "powerful inducements" to make answers which he had no way of knowing would later be twisted to convict him in a federal criminal trial leading to a sentence of three years' imprisonment.

The *Henry* case continues:

> "*Powell* was based on the rationale that an unaided layman, who has little or no familiarity with the law [and defendant Victor Schroeder certainly is just that], requires assistance in the preparation and presentation of his case and in coping with procedural complexities in order to assure a fair trial. The Court in *Powell* stated: 'Historically and in practice, in our country at least, [a hearing] has always included *the right to the aid of counsel when desired* and *provided by the party asserting the right* (emphasis added).'"

U.S. v. *Henry*, 447 U.S. 264, 291

The *Henry* case continues: "Under the strictures of the Court's holdings on the exclusion of evidence, we conclude that the Court of Appeals did not err"; but, in the instant case, defendant, without counsel, had no knowledge of how to exclude any evidence, and, on the contrary, his lack of legal knowledge prevented him from presenting evidence and witnesses of his own. *Henry* stands for the principle that "the Sixth Amendment must 'apply to indirect and surreptitious, as well as those conducted in the jailhouse.'" PCA's information turned over to the U.S. Prosecutor included the aforesaid civil deposition transcript which was indirect and surreptitious interrogatories, elicited without any Fifth Amendment warning of possible self-incrimination.

The Seventh Circuit Court of Appeals Opinion admits:

> "The single most damaging piece of evidence against Mr. Schroeder was a transcript of his own deposition, taken in earlier civil litigation in which he was a defendant. The following extracts are typical of Mr. Schroeder's testimony in that deposition (App. unnumbered pp. 19-29):
>
> Q. Did you tell [the Production Credit Association loan officer] that you had 110,000 bushel of shell corn?
>
> A. Yeah, but I didn't have that much.
>
> Q. Why did you tell him you had 110,000 bushel?
>
> A. Because I wanted to get the operation going, trying to get money, keep the thing going. Thought I would pull out. Like I said before, I wanted to keep the thing going.
>
> Q. Did you in fact have 5400 hogs at that time?
>
> A. No, I don't think so. Like I says, I wanted to keep the operation going * * *.
>
> Q. You also listed 17 trucks, is that correct?
>
> A. Didn't have them.
>
> Q. You did not have them?
>
> A. No.
>
> Q. Did you have any trucks?
>
> A. Three or four.

Q. Well, let's take the first item of cash, $150,000.

A. I didn't have it.

Q. How much cash did you have on May 15, 1978?

A. Maybe could have had $10,000 or so. I don't know, boys. I mean I wanted to keep the operation going."

The lawyer who was representing Mr. Schroeder at the taking of the civil deposition was, in fact, incompetent when he advised his client to state, "I wanted to keep the operation going." He is currently being sued by Mr. Schroeder in the Western District of Wisconsin federal court, case number 82C42, because "he was fired for allowing them [Mr. and Mrs. Victor Schroeder] to be legally in default in a foreclosure suit filed against them by PCA [Production Credit Association of Madison], and for otherwise apparently conspiring with other defendants".

The Court of Appeals' Opinion continues,

"Ordinarily statements by a party are freely admissible under Rule 801(d)(2) of the Federal Rules of Evidence. Mr. Schroeder thinks his statements should not be, because he was supposedly tricked into not asserting his Fifth Amendment right to remain silent at his deposition. His point is not that he was uncounseled then, because he had an attorney when the deposition was taken. . . . Rather he suggests that the decision to answer questions was not informed, because he did not know that the plaintiff PCA was really the government's stalking horse, taking the deposition to turn it over to the government prosecutor. On the basis of the claimed identity between the PCA and the United States Attorney, Mr. Schroeder likens his case to the unconstitutional surveillance in *Massiah* v. *United States*, 377 U.S. 201, or the unconstitutional interrogation in *Brewer* v. *Williams*, 430 U.S. 387.

. . . The deposition was taken more than seven months before the grand jury voted an indictment. It was taken by a private attorney representing the

PCA. Congress has chartered that Association, and United States Attorneys are of course federal employees."

The Court of Appeals held, "The argument fails because its premise fails." But, when the defendant gets a fair trial with counsel of his own choice in whom he has confidence, rather than no counsel at all, it is certainly more probable than not that he will then be able to prove a closer connection between the "private attorney representing the PCA" chartered by Congress, and the United States attorneys, or be able to prove "government involvement in the securing of Mr. Schroeder's deposition." Such an attorney could also prevent the defendant from admitting "conduct that made him liable to the PCA and the other lenders" and might well prove, instead, that his conduct had not made him so liable, thereby being innocent of the crime charged.

The Government would never have proved beyond a reasonable doubt that the defendant had knowingly made any false statement or wilfully overvalued his property to induce lenders to extend him credit, if the civil deposition would be excluded for failure to give him a prior Miranda-type warning, or if his attorney had not advised him to agree that he had made false statements but only to keep his operation going. After all, Production Credit Associations were established to keep farmers' operations going.

The Court of Appeals ruled on this issue, "The evidence was overwhelming that Mr. Schroeder had listed more assets than he had in order to borrow money to keep his farming operation going." While the evidence presented at the trial, such as it was, with the disastrous conduct of the defendant without an attorney, may have appeared to be sufficient to convict him, said evidence was comprised, almost entirely, of the reading of his civil deposition wherein his civil attorney had urged him to answer questions to the effect that whatever he had done, he did it "to keep his farming operation going."

This farmer with an eighth-grade education, who continuously insisted that he wanted counsel of his choice in whom he had confidence, and who did find such counsel but only when the case was on appeal after defendant had been forced to trial five months after indictment, was absolutely ignorant of the procedure to be followed with a motion to suppress incriminating statements such as his civil deposition which was read to the jury. Defendant, petitioner herein, was completely ignorant of the existence of the Federal Magistrates Act, 28 U.S.C. § 636(b)(1), which authorizes a district court to refer such a motion to a magistrate and thereafter to determine and decide such a motion.

Although the testimony at the civil deposition was given upon advice of counsel, he had no indication that he was, in legal effect, giving a criminal confession, under *Malloy* v. *Hogan*, 378 U.S. 1, 7 (1964), and *Bram* v. *United States*, 168 U.S. 532, 542 (1897). If he had been represented by counsel in the criminal case, he would have filed a motion to suppress the civil deposition on the grounds that he had been induced by the attorney he had at the deposition to testify that he had given the figures for his loan application in order to keep his farming operation going, after having borrowed from the PCA from 1961 to 1978 without their having checked his collateral or taken serial numbers of equipment and vehicles, because his attorney indicated to him that such a statement would not be harmful inasmuch as PCA's have a duty under a Congressional mandate of the Farm Credit Act to help farmers keep their farming operations going by meeting their production credit needs. Only after the same attorney allowed defendant to be in default for failure to answer or otherwise plead in an action by PCA foreclosing the second mortgage on defendant's farm, while it and the first mortgage with the Federal Land Bank were not in default, did defendant-petitioner realize that his then-attorney was advising him contrary to his best interests.

Rather than being advised that cooperation in the civil case would benefit him, such as is done in a criminal case when a defendant is asked to cooperate; on the contrary, he was given no warning or inkling that, by making the admission recommended by his counsel, he risked the chance of subsequent criminal conviction by the reading to the criminal jury of his civil deposition. This, together with his complete lack of counsel at his criminal trial, thereby having no way of suppressing the damaging civil admissions, certainly denied him a fair trial.

If he had had counsel, and the counsel had argued a motion to suppress the civil deposition under the Federal Magistrates act, he could then have been getting the kind of Due Process afforded in the case of *United States* v. *Raddatz*, 447 U.S. 667 (1980) where, at page 672, it states,

> "However, the Court of Appeals held that respondent had been deprived of due process by the failure of the District Court personally to hear the controverted testimony."
>
> "We have repeatedly pointed out, however, that the interests underlying a voluntariness hearing do not coincide with the criminal law objective of determining guilt or innocence. . . . (W)e considered whether the prosecution was required to prove beyond a reasonable doubt that a confession was voluntary. In holding that a preponderance of the evidence was sufficient, we stated that 'the purpose of a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts.' (p. 678)."

Defendant-petitioner's laymen advisers were not schooled in legal procedure; they knew nothing about a voluntariness hearing or the differences between a magistrate and a district judge. They did know, however, from everyday commonsense, that in the criminal court system there is room for "improving the reliability of jury verdicts." For that very reason, they had advised him, and he already personally believed, that he would have a better chance of a fair trial without a jury; but that was denied.

To the best of petitioner's counsel's knowledge, the United States Supreme Court has not yet considered whether a deposition in a civil case, where "a preponderance of the evidence was sufficient", is governed by the rules and caselaw of criminal cases for suppressing confessions, when the voluntariness of the admission is at issue, as here. Petitioner would almost certainly not have been convicted were it not for the reading into the criminal record of admissions in his civil deposition. For all practical purposes, said deposition was used precisely as a criminal confession would have been; and yet, because he was denied adequate time to find counsel of his choice and was instead forced to trial alone when he had not wanted to act as his own attorney, he was convicted upon the strength of his "civil confession". This court should extend the Miranda warnings to civil cases which may lead to criminal charges, or this Court should require judges to conduct voluntariness hearings before allowing the admission of such civil depositions. "This court on other occasions has noted that the interests at stake in a supression hearing are of a lesser magnitude than those in the criminal trial itself", *Raddatz*, p. 679; but, in the instant case, the lack of a suppression hearing proved to be of the same magnitude as the criminal trial itself. If he had been allowed to have counsel of his choice, there would surely have been a suppression hearing where "the court may rely on hearsay and other evidence"; and, therefore, Victor Schroeder would have been able to bring out that he had stated that he had done what he had, only to keep the farming operation going, because his lawyer told him to, contrary to what he would otherwise voluntarily have stated.

In the instant case, the jury found the defendant-petitioner guilty by listening to the reading by the civil court reporter of the cold record of the civil deposition. In this case the jury was allowed, because defendant had no legal knowledge as to how to prevent it, to make its determina-

tion of guilt "on the cold record" of the civil deposition, and then only on a portion of the deposition; "courts must always be sensitive to" such problems, which the court was not, in this case. "While stating that 'the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it,' 285 U.S. at 64, the Court pointedly noted a 'distinction of controlling importance' between records formed before administrative agencies and those compiled by officers of the court such as masters in chancery", *Raddatz,* p. 682. Likewise, in the instant case, "the enforcement of constitutional rights" of this defendant-petitioner "requires that the Federal court should determine such an issue" as the reading into the criminal record and to the jury the partial content of the civil deposition.

In the aforementioned *Raddatz* Opinion, Justice Powell added: "Moreover, the risk of erroneous deprivation of rights is real when a decider of fact has not heard and observed the crucial witnesses. The value of hearing and seeing those witnesses testify is undeniable. Finally, the government interest in limiting rehearing is not sufficient to outweigh these considerations." (p. 687)

> "(T)he central purpose of the Fifth Amendment privilege [against self-incrimination] is to protect the defendant from being compelled to testify against himself at his own trial. Moreover, since a defendant's decision whether to testify is typically based on the advice of his counsel, it often could not be explained without revealing privileged communications between attorney and client." *Jenkins* v. *Anderson,* 447 U.S. 231, 242 (1980).

In the instant case, however, the defendant was denied this constitutional right in two ways: (1) he was not informed, when he had had counsel at the civil deposition a year earlier that what he might say there might be used for a criminal conviction later, and (2) he was without counsel, contrary to his own demands for counsel of his choice, when he was forced to trial; and his feeble at-

tempts at legal procedure were, in the Court's own words, a disaster, knowing nothing about motions to suppress or about how to testify while on the stand, or whether to remain silent. "For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege", *Id.*, p. 244. This "petitioner was in a position to have his testimony compelled" when his civil deposition was taken in 1979; he followed his attorney's advice in the way he testified. His attorney gave him no warning, Miranda-type or otherwise; but, in any event, the sanctions available in civil discovery may well have prevented his "taking the Fifth".

Not only do "the warnings required by *Miranda* v. *Arizona,* 384 U.S. 436, 479, contain an implicit assurance that subsequent silence may not be used against the defendant"; this Court should now hold that *Miranda* also contains an implicit assurance that a civil deposition without a prior Miranda-type warning cannot be used as an admission in a criminal trial based upon the same facts. It is akin to the difference in a criminal case between a guilty plea and a *nolo contendere* plea; the latter cannot be used as an admission in a civil case based upon the same facts.

The civil deposition was read to the jury as direct evidence; it was not used to impeach a prior inconsistent statement. It *was* the prior statement for which there were no inconsistent statements at the trial. The question here differs from that in *United States* v. *Henry,* 447 U.S. 264, 270 (1980), which was "whether under the facts of this case a Government agent 'deliberately elicited' incriminating statements" from the defendant without his being represented by counsel. In the instant case, although defendant had been represented by counsel at the taking of his civil deposition based upon the same facts as those at his criminal trial about a year later, the reading of admissions in the civil deposition to the criminal jury was a violation

of his Fifth Amendment right against self-incrimination while also being a violation of his Sixth Amendment right to counsel because he was forced to trial without any counsel. If he had been given as much time to find counsel of his own choice in whom he had confidence as the time which had elapsed between the civil deposition and the criminal trial, he would have found the counsel who is preparing this petition and who handled his appeal before the Seventh Circuit Court of Appeals.

Nevertheless, defendant believes, whether he can prove it from the record or not, that the taking of said civil deposition was done by an attorney and client (PCA) who were indeed deliberately eliciting testimony for later use by the government prosecutor against this particular defendant as selective prosecution because, as a supposed member of the "Sheriff's Posse Comitatus" he was a target of law enforcement officials, particularly the Attorney General of Wisconsin. The Court of Appeals recognized this contention by using a term not used by appellant, that the persons taking the civil deposition were the "stalking horse" for the Government.

The Government should not be allowed to "apply a less rigorous standard under the Sixth Amendment where the accused is prompted by an undisclosed undercover informant than where the accused is speaking in the hearing of persons he knows to be Government officers", *Id.*, p. 272. Under the facts of the instant case, it is necessary "to infuse Fifth Amendment concerns against compelled self-incrimination into the Sixth Amendment protection of the right of assistance to counsel. . . . Indeed, the *Massiah* Court noted that if the Sixth Amendment 'is to have any efficacy it must apply to indirect and surreptitious interrogations. . . . Moreover, the concept of a knowing and voluntary waiver of Sixth Amendment rights does not apply in the context of communications with an undisclosed undercover informant", *Id.*, p. 273.

In the dissenting opinion by Justice Blackmun, he dissents by stating, "Thus, while claiming to retain the 'deliberately elicited' test, the Court really forges a new test that saps the word 'deliberately' of all significance. The Court's extension of *Massiah* would cover even a 'negligent' triggering of events resulting in reception of disclosures." *Id.*, p. 279. The use of the civil deposition as the principal evidence in the subsequent criminal trial, whether elicited by government agents, or by the negligence of either attorney at the deposition in not warning defendant that his statements might be used to convict him criminally; such use without aid of trial counsel to prevent the admission of such deposition, for purposes other than challenging credibility, meets the new *Henry* test of being "a negligent triggering of events resulting in reception of disclosures" by the jury as the basis of their finding of guilt. Such test is not established by the dissenting opinion; it is the dissent's objection to what the majority had done by establishing a new test for violation of the Fifth Amendment right against self-incrimination. Justice Blackmun also refers (p. 281) to the Sixth Amendment right "of providing counsel to counterbalance prosecutorial expertise and to aid defendants faced with complex and unfamiliar proceedings." That, too, is directly applicable to the facts and procedures in the instant case.

Another *Henry* dissent, by Justice Rehnquist, has this basis (p. 290): "Here, as in *Massiah*, the accused was not prevented from consulting with his counsel as often as he wished." In the instant case, however, "the accused *was* . . . prevented from consulting with his counsel" entirely; because the mere 5 months which the trial judge had allowed him to find counsel of his own choice, who was not a part of the local Bar, was not enough for him to find such a counsel; whereas, about two months later, he did find his present counsel, in whom he has confidence, because he is from another State.

In the case of *United States* v. *Ward*, 448 U.S. 242, 248 (1980),

> "The distinction between a civil penalty and a criminal penalty is of some constitutional import. The Self-Incrimination Clause of the Fifth Amendment, for example, is expressly limited to 'any criminal case. . . .' Similarly, the protections provided by the Sixth Amendment are available only in 'criminal prosecutions. . . .' We turn then to consider whether Congress, despite its manifest intention to establish a civil, remedial mechanism, nevertheless provided for sanctions so punitive as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.' . . . According to the [*Boyd*] Court:
>
> > 'We are . . . clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal.' . . . While at this point in its opinion, the Court seemed to limit its holding to proceedings involving the forfeiture of property, shortly after the quoted passage it broadened its reasoning in a manner that might seem to apply to the present case: 'As, therefore, suits for *penalties and forfeitures* incurred by the commission of offenses against the law, are of this quasi-criminal proceedings for all the purposes . . . of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself. . . .' (p. 252)."

The *Ward* case continues (p. 253):

> "The question before us, then, is whether the penalty imposed in this case, although clearly not 'criminal' enough to trigger the protections of the Sixth Amendment, the Double Jeopardy Clause of the Fifth Amendment, or the other procedural guarantees normally associated with criminal prosecutions, is nevertheless 'so far criminal in [its] nature' as to trigger the Self-Incrimination Clause of the Fifth Amendment. Initially, we note that the penalty and proceeding considered in *Boyd* were quite different from those considered in this case."

Petitioner is asking the High Court to extend the rule of *Miranda* to require a warning of possible self-incrimination at the taking of a civil deposition where the facts of that case could support a criminal charge against him. This Court could do this, applying the concept in *California* v. *Prysock*, 451 U.S. 1301, 1304 (1981): "In short, none of the decisions cited for the proposition that the rigidity of *Miranda* is its great virtue" support the proposition that the desirable rigidity extends to the precise formulation of the warnings.

The constitutional question in the instant case is somewhat similar to the circumstances of *Estelle* v. *Smith*, 451 U.S. 454, 461 (1981):

> "Of the several constitutional issues addressed by the District Court and the Court of Appeals, we turn first to whether the admission of Dr. Grigson's testimony at the penalty phase violated respondent's Fifth Amendment privilege against compelled self-incrimination because respondent was not advised before the pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at a sentencing proceeding. Our initial inquiry must be whether the Fifth Amendment privilege is applicable in the circumstances of this case."

The case continues (p. 462):

> "The Fifth Amendment, made applicable to the states through the Fourteenth Amendment [has] . . . 'the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'"
>
> "The Court has held that 'the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.' *Id.*, 462."
>
> "In *Miranda* v. *Arizona*, 384 U.S. 436, 367 (1966), the Court acknowleged that 'the Fifth Amendment

> privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.' (p. 466)."

"The Fifth Amendment privilege is 'as broad as the mischief against which it seeks to guard,' *Counselman* v. *Hitchcock,* 142 U.S. 547, 562 (1892)' (p. 468)." "And in *United States* v. *Wade,* 388 U.S. at 226-227 the Court explained:

> "It is central to [the Sixth Amendment] principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.' (p. 470)."
>
> "Because '[a] layman may not be aware of the precise scope, the nuances, and the boundaries of his Fifth Amendment privilege,' the assertion of that right 'often depends upon legal advice from someone who is trained and skilled in the subject matter.' (p. 471)."

This Court reasoned as follows in *United States* v. *Morrison,* 449 U.S. 361, 364 (1981):

> "The Sixth Amendment provides that an accused shall enjoy the right 'to have the Assistance of Counsel for his defense.' This right, fundamental in our system of justice, is meant to assure fairness in the adversary criminal process."
>
> "Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial (p. 365)."

This Court, in *United States* v. *Raddatz, supra,* made these important statements:

> "To be sure, courts must always be sensitive to the problems of making credibility determinations on the cold record. More than 100 years ago, Lord Coleridge stated the view of the Privy Council that a retrial should not be conducted by reading the notes of the witnesses' prior testimony:

> 'The most careful note must often fail to convey the evidence fully in some of its most important elements. . . . It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; . . . the dead body of the evidence, without its spirit; which is supplied, when given openly and orally, by the ear and eye of those who receive it.' *Queen* v. *Bertrand,* 4 Moo. P.C.N.S. 460, 481, 16 Eng. Rep. 391, 399 (1867).' (p. 679)."

Justice Marshall made these relevant observations (p. 696-7):

> "The principle that '[t]he one who decides must hear,' *Morgan* v. *United States,* 298 U.S. 468, 481 (1936), is supported by two distinct rationales. First, judicial factfinding on the basis of a written record carries an intolerably high risk of error. Any experienced lawyer is aware that findings of fact frequently rest on impressions of demeanor and other factors which do not appear on the fact of the record. As the Court stated in *Holiday* v. *Johnston,* 313 U.S. 342, 352 (1941), '[o]ne of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony.' . . . See also *Wingo* v. *Wedding,* 418 U.S. 461 (1974) . . . .
>
> "The principle is not, however, based solely on the constitutional interest in accurate factfinding. It also derives from the notion that, as a matter of basic fairness, a person facing the prospect of grievous loss is entitled to relate his version of the facts . . . . The Due Process Clause 'promot[es] participation and dialogue . . . in the decisionmaking process.' *Marshall* v. *Jerrico, Inc.,* 446 U.S. 238, 242 (1980), by ensuring that individuals adversely affected by governmental action may confront the ultimate decisionmaker and thus play some part in formulating the ultimate decision. . . . In this respect, the requirement that a finder of facts must hear the testimony offered by those whose liberty is at stake derives from deep-seated notions of fairness and human dignity. See *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U.S. 123, 170 (1951)

> . . . . A rule that would allow a criminal defendant to face a jail sentence on the basis of factual findings made by one who has not heard the evidence is, in my view, foreign to notions of fair adjudicative procedure embodied in the Due Process Clause.

Justice Marshall continued (p. 700):

> "As my Brother POWELL has explained: 'In our criminal justice system as it has developed, suppression hearings often are as important as the trial which may follow.' . . . indeed, Congress itself recognized the importance of suppression motions by providing for a *de novo* determination by the district judge."

The evidence, other than the civil deposition, would have proved, if he had had competent counsel of his own choice in whom he had confidence, that, since the Farm Credit Act grants to the Federal Land Banks the function and right to take real estate mortgages as security for loans to farmers, but the act grants no such right to Production Credit Associations, who took said deposition, and whose function is to satisfy the credit needs of farmers to purchase production equipment and livestock but not farmland—the evidence so produced would not have been sufficient to convict the defendant.

III.

The Defendant Did Not Get A Fair Trial Because, As A Purported Member Of An Organization Known As The Posse Comitatus, He Was Selectively Prosecuted And Made An Example.

After defendant had been found guilty by the jury when he had insisted on a bench trial, and when he had been denied enough time to locate a counsel of his choice in whom he would have confidence, the Court then appointed an attorney to represent him in the presentence investigation. Said lawyer filed a Motion to Strike or Disregard Portions of the presentence investigation (see Appendix, Mar. 17, 1981). In it he asked that "all references in the presen-

tence investigation report referring to defendant's alleged affiliation with the posse comitatus" be disregarded.

Although it is not apparent from the record in this case; because the defendant, being ignorant of all legal procedures, did not know how to bring things into the record, the various civil cases along with this criminal case are, to some extent at least, according to out-of-court statements, the result of a decision to prosecute members of the "Sheriff's Posse Comitatus" of which the defendant was, apparently wrongly, believed to be a member. This could be elaborated upon in a brief to be filed when and if this Court grants the writ of certiorari.

CONCLUSION

It is respectfully suggested that this Court grant a Writ of Certiorari so that it can consider whether Miranda warnings should be extended to civil depositions which may lead to criminal convictions, and whether the judge should hold a voluntariness hearing before allowing a civil deposition to be used as evidence in a criminal case based upon the same facts.

This Court should also consider whether, being forced to go to trial in a criminal case without any counsel, when he could afford counsel of his choice in whom he had confidence, six months was an unreasonably short time to find such counsel from out-of-state.

Respectfully submitted,

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Appendix

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued December 11, 1981

January 20, 1982.

Before

Hon. Walter J. Cummings, Chief Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. Richard A. Posner, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 81-1461 vs.

VICTOR SCHROEDER,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 80-CR-42

James E. Doyle, *Judge*.

ORDER

Victor Schroeder used to own and operate a 320-acre hog farm near Lodi, Wisconsin. For almost twenty years he obtained the capital he needed by making loans secured by his land, equipment, and livestock from the federally char-

tered Production Credit Association (PCA) and individual banks. Beginning in 1979, everything came unstuck. First the lenders filed various civil suits against Mr. Schroeder which ultimately resulted in a sheriff's sale of his farm, machinery, and livestock. In July of 1980 a federal grand jury indicted Mr. Schroeder on three counts of making false statements to lending institutions, in violation of 18 U.S.C. § 1014 (1976). A jury convicted Mr. Schroeder on all counts in early 1981, and Judge Doyle sentenced him to three years' imprisonment as explained *infra*. Mr. Schroeder has asked us to reverse his criminal conviction but we cannot do so.

I. *Mr. Schroeder's Fifth and Sixth Amendment Rights Were not Violated when He Stood Trial without Counsel.*

It is well settled that a criminal defendant in Mr. Schroeder's position has a constitutional right to the assistance of counsel and that a lawyer will be appointed at the government's expense if the defendant cannot afford to hire one. Here the problem was that Mr. Schroeder dismissed appointed counsel, and despite repeated continuances and postponements could not find an attorney of his own choosing. Believing that Jesus Christ had condemned all lawyers, Mr. Schroeder wanted to be represented by someone who had the expertise of a lawyer but was not a member of an organized bar. Under the district court's rules such a person, even if he could be found, could not represent Mr. Schroeder. Judge Doyle did what he could faced with this impasse. First he tried without success to persuade Mr. Schroeder to accept an attorney. Then he had Mr. Schroeder examined by a psychiatrist who determined that Mr. Schroeder was competent to stand trial and as capable as others of comparable intelligence and education

of representing himself. Finally Judge Doyle made efforts to explain the proceedings to Mr. Schroeder as they were going on and allowed him to have several friends at the defense table during trial. Having taken those precautions, Judge Doyle was justified in going ahead with the trial on the understanding that Mr. Schroeder had waived his right to be represented by counsel.

Mr. Schroeder's conduct of his own defense was a disaster. He was disorganized and ill-prepared. He was unfamiliar with the rules of evidence. And he offered highly idiosyncratic theories to defend himself—for example, that he was somehow not liable because the loans to him had not been made in Federal Reserve Notes or silver dollars. But the injury was self-inflicted. The case law is clear that a competent defendant cannot stave off the day of reckoning by refusing both retained and appointed counsel, *Relerford* v. *United States*, 309 F.2d 706, 708 (9th Cir. 1962). Furthermore, while a defendant is entitled to reasonable time to find counsel, a trial judge has discretion to decide when a fair opportunity has been afforded. *United States* v. *Arlen*, 252 F.2d 491, 494 (2d Cir. 1958). We cannot say that Judge Doyle was wrong when he concluded that five months was long enough.

II. *Mr. Schroeder's Fifth Amendment Right to a Fair Trial Was not Abridged when Judge Doyle Refused to Allow Him to be Tried without a Jury.*

Mr. Schroeder asked Judge Doyle to dispense with a jury because it would be unduly subject to the prosecutor's influence, would waste the taxpayers' money, and would be a scapegoat for the errors of the government and the judge (App. unnumbered p. 71). Judge Doyle denied Mr. Schroeder's request. That decision was entirely consistent with his practice of trying to accord Mr. Schroeder as

many of the accoutrements of a normal criminal proceeding as he would accept. Mr. Schroeder assumes that the Sixth Amendment's guarantee of a jury trial in criminal cases implies a correlative right *not* to have a jury. The Supreme Court rejected that proposition more than twenty-five years ago in *Singer* v. *United States*, 390 U.S. 24.

III. *The Evidence Was Sufficient to Convict Mr. Schroeder of the Offense Charged.*

Mr. Schroeder argues that the government never proved that he "knowingly made any false statement" or "willfully overvalued his property" (18 U.S.C. § 1014) to induce lenders to extend him credit. First he says that he did not have the legal sophistication to do so, but that argument confuses the intent to make a false statement with an understanding of the likely consequences of so doing. Second, he says that he was not responsible for the accuracy of his statements, because the lenders were supposed to check them. It is likely that if the lenders had checked, none of them would have lent Mr. Schroeder money. But the law under which Mr. Schroeder was charged would still have been violated, because it prohibits making false statements to induce the granting of credit whether or not the money is actually obtained. Third, Mr. Schroeder says that his statements were not really false, because they simply corrected an artificially low appraisal of his farm. This argument confuses Mr. Schroeder's motive (to obtain the amounts of credit he thought his collateral as a whole was worth) with his intent (to overstate the value of his livestock and his farm equipment). Motive is legally irrelevant under this statute. The evidence was overwhelming that Mr. Schroeder had listed more assets than he had in order to borrow money to keep his farming operation going.

IV. *The Use of Mr. Schroeder's Deposition from the 1979 Civil Case in this Criminal Proceeding did not Violate his Right not to Incriminate Himself.*

The single most damaging piece of evidence against Mr. Schroeder was a transcript of his own deposition, taken in earlier civil litigation in which he was a defendant. The following extracts are typical of Mr. Schroeder's testimony in that deposition (App. unnumbered pp. 19-29):

> Q. Did you tell [the Production Credit Association loan officer] that you had 110,000 bushel of shell corn?
> A. Yeah, but I didn't have that much.
> Q. Why did you tell him you had 110,000 bushel?
> A. Because I wanted to get the operation going, trying to get money, keep the thing going. Thought I would pull out. Like I said before, I wanted to keep the thing going.
> Q. Did you in fact have 5400 hogs at that time?
> A. No, I don't think so. Like I says, I wanted to keep the operation going * * *.
> Q. You also listed 17 trucks, is that correct?
> A. Didn't have them.
> Q. You did not have them?
> A. No.
> Q. Did you have any trucks?
> A. Three or four.
> Q. Well, let's take the first item of cash, $150,000.
> A. I didn't have it.
> Q. How much cash did you have on May 15, 1978?
> A. Maybe could have had $10,000 or so. I don't know, boys. I mean I wanted to keep the operation going * * *.

Ordinarily statements by a party are freely admissible under Rule 801(d)(2) of the Federal Rules of Evidence. Mr. Schroeder thinks his statements should not be, because he was supposedly tricked into not asserting his Fifth Amendment right to remain silent at his deposition. His point is not that he was uncounseled then, because he had

an attorney when the deposition was taken. Nor does he say that his lawyer was incompetent. Rather he suggests that the decision to answer questions was not informed, because he did not know that the plaintiff PCA was really the government's stalking horse, taking the deposition to turn it over to the government prosecutor. On the basis of the claimed identity between the PCA and the United States Attorney, Mr. Schroeder likens his case to the unconstitutional surveillance in *Massiah* v. *United States*, 377 U.S. 201, or the unconstitutional interrogation in *Brewer* v. *Williams*, 430 U.S. 387.

The argument fails because its premise fails. The deposition was taken more than seven months before the grand jury voted an indictment. It was taken by a private attorney representing the PCA. Congress has chartered that Association, and United States Attorneys are of course federal employees. No closer connection than that was alleged, and there was no showing of government involvement in the securing of Mr. Schroeder's deposition. Mr. Schroeder admitted conduct that made him liable to the PCA and other lenders; the same conduct was also a federal crime. That sad fortuity will not support a constitutional attack on his criminal conviction.

V. *The Sentences Imposed by Judge Doyle Were not Excessive.*

Judge Doyle sentenced Mr. Schroeder on three different counts. Count I involved a loan from the Bank of Lodi; Count II, a loan application (no funds were disbursed) to the Arlington State Bank; and Count III, a loan from the PCA. Judge Doyle imposed 18-month sentences on each count, but made the sentences on Counts I and III concurrent, so that the total time to be served is three years.

Mr. Schroeder argues that he should be sentenced on only one count, either because the financing of the hog-farm seemed like a single transaction to him (Br. 27) or to the various lenders (Br. 32A). These considerations are not relevant. The government may charge numerous violations arising out of a given course of conduct, so long as each one requires proof of a fact that the others do not. *United States* v. *Mathis,* 579 F.2d 415, 418 (7th Cir. 1978). Here there were three different financial statements, made at three different times, to three different lenders. Each count therefore required distinct items of proof.

The maximum sentence that Judge Doyle could have imposed would have been two years on each count, the terms to be served consecutively, for a total of six years. The sentence he did impose is half so severe. When a judge sets a sentence within the statutory limits, our review of his decision is confined to two questions. Is there an Eighth Amendment violation under the strict standards of *Hutto* v. *Davis* (January 11, 1982), 50 U.S.L.W. 3540 (*per curiam*)? Or has the trial judge completely failed to exercise his discretion and to make an individualized determination, *United States* v. *Brubaker,* 663 F.2d 764, 768, 770 (7th Cir. 1981)? The record reveals no such constitutional violation or failure.

For the foregoing reasons the judgment appealed from is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff,	)	ORDER
-v-	)	No. 80-CR-42
VICTOR SCHROEDER, Defendant.	)	

This order is designed to ensure compliance with the time limits prescribed in this court's plan for the prompt disposition of criminal cases adopted in accordance with the requirements of the Speedy Trial Act of 1974 (18 U.S.C. §§3161-3174). To ensure compliance with speedy trial requirements, it is essential that the time limits set forth in this order be fully complied with.

The defendant having appeared for arraignment and having entered a plea of not guilty.

IT IS HEREBY ORDERED:

1. That within five working days counsel for the defendant meet with a representative of the United States Attorney's office who is to make available any appropriate discovery.

2. Further, that counsel and defendant appear for a pretrial conference to be held in accordance with Rule 17.1 of the Federal Rules of Criminal Procedure. Such pretrial conference will be held within 15 to 20 days of the date of this order, at a time to be specified by the clerk of court.

3. That no later than one day prior to the pretrial conference, counsel file and serve any and all pretrial motions including motions for discovery if counsel have been unable to agree on the material which is to be disclosed by each side. If a discovery motion is filed, it shall set forth that a conference was held between a representative of the United States Attorney's office and defense counsel, the name of the persons involved in such conference, and the specific material as to which agreement could not be reached. If a motion to suppress is filed, it shall be accompanied by an affidavit by a person competent to testify to the facts therein, setting forth with particularity the facts upon which the motion is grounded. Motions filed in advance of the pretrial conference need not be accompanied by briefs or memoranda in support thereof.

4. A principal purpose of the pretrial conference is to identify all motions and any other matters which can be decided prior to trial. In the event that there is need for briefs, documentation, an evidentiary hearing, or argument, a time will be fixed by the United States Magistrate, within which those further proceedings shall be completed.

5. The court will not extend the time set by or pursuant to this order, absent a finding by the court that the ends of justice served by such extension outweigh the best interest of the public and the defendant in a speedy trial.

Dated this 22nd day of August, 1980.

BY THE COURT:

/s/ *William L. Gansner*
WILLIAM L. GANSNER
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff,	:	
v.	:	80-CR-42
VICTOR SCHROEDER, Defendant.	:	

PRETRIAL CONFERENCE MEMORANDUM

On August 27, 1980, the Clerk of Court issued a notice scheduling a pretrial conference in this case for today, September 10, 1980, at 2:30 p.m. A copy of the notice was mailed to defendant; the Postal Service's return receipt card in the court's file indicates that a person signing the name Victor Schroeder received the mailing on August 28, 1980.

The pretrial conference scheduled for today was commenced at 2:40 p.m. Grant Johnson appeared for the United States of America. There was no appearance by or on behalf of defendant Victor Schroeder.

It was noted that on September 2, 1980, the defendant filed with the court both a notice of appeal from the "not guilty" plea entered by the magistrate in this case on August 22, 1980, and a motion apparently seeking a stay of further proceedings in this case. The court intended to address the motion for stay at today's conference, and therefore had taken no action on the motion.

It is possible that defendant's failure to appear at today's pretrial conference is a result of defendant's assumption that the filing of his notice of appeal and motion for stay terminated his obligation to appear at the conference. If such an assumption was made by defendant, it was mistaken and erroneous. The court has neither considered nor decided the motion for stay of proceedings.

In light of this possible explanation for defendant's absence today, it was determined that a bench warrant for the arrest of defendant would not be issued and that, instead, the conference would be rescheduled for Monday, September 15. 1980. Accordingly, the Clerk of Court was directed to reschedule the conference for that date, to mail notices of the rescheduled conference to the parties, and to attempt to contact the defendant by telephone as soon as possible to advise him personally of the new conference date.

If defendant does not appear in person at the rescheduled pretrial conference, the court will consider the issuance of a bench warrant for his arrest.

Entered this 10th day of September, 1980.

/s/ William L. Gansner

WILLIAM L. GANSNER

United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff,	:	
v.	:	80-CR-42
VICTOR SCHROEDER, Defendant.	:	

ORDER

At a status conference on September 22, 1980, I reviewed the question of defendant's representation in this case and his desire to be represented by non-lawyer "counsel," and I then ordered the following:

1) that the clerk appoint counsel for the defendant, upon my finding that defendant had been "unable to obtain counsel," within the meaning of Rule 44(a), F.R.Cr.P.;[1]

2) that the earlier-established trial date of October 7, 1980, be cancelled, and

3) that the case be continued for a period of 30 days, until October 22, 1980, so that the defendant might have sufficient time in which to meet and discuss this case and in which appointed counsel could advise defendant of the advantages of representation by a trained lawyer.

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[1] At the same time, I explained to the defendant that he was not obliged and could not be compelled to accept the assistance of appointed counsel.

The ordering of the 30-day continuance was done on my own motion, on the basis of my perhaps unarticulated belief that a continuance in which defendant would have the opportunity of being advised by appointed counsel of the benefits of representation by a trained lawyer—in addition to the similar advice already given to defendant by the court—was necessary in order to assure that: 1) defendant fully appreciate the significance of his right to counsel; 2) defendant fully recognize the injury to his fair trial rights that might result from his proceeding to trial without a trained lawyer; and 3) appointed counsel, if accepted by defendant, have reasonable time for effective preparation in this case.

The principal purposes of this ORDER are to make clear for the record my reasons for granting the 30-day continuance on September 22, 1980, and to further state that it was and is my finding—on the basis of the above-stated reasons—that the ends of justice served by the granting of the continuance outweighed and do outweigh the best interest of the public and the defendant in a speedy trial.

Accordingly, pursuant to 18 U.S.C. § 3161(h)(8)(A), IT IS ORDERED that the period of delay resulting from the 30-day continuance I granted on September 22, 1980, be excluded in computing the time within which the trial of this case must commence.

Entered this 17th day of October, 1980.

/s/ William L. Gansner

WILLIAM L. GANSNER
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	80-CR-42
VICTOR SCHROEDER, Defendant.	)	

ORDER

Defendant's unresponsiveness to my questions and statements during a status conference on October 24, 1980 and a pretrial conference on October 31, 1980, prompts me, on the court's own motion, to order that the defendant be examined as to his mental condition by a qualified psychiatrist who is to report to the court. 18 U.S.C. § 4244.

The purpose of the examination is to permit the psychiatrist to form and express an opinion, if in fact he is able to do so, on the questions whether defendant is presently insane or otherwise so mentally incompetent:

(1) as to be unable to understand these proceedings against him; or

(2) as to be unable properly to assist in his own defense if he were to be represented in the case by a person licensed to practice law; or

(3) as to be unable properly to assist in his own defense, without the assistance of a person licensed to practice law.

As to point (3), above, the psychiatrist is requested to bear in mind the difficulties which would be encountered in defending a criminal prosecution by any person whose level of intelligence is approximately equal to that of this defendant and who is untrained in the law and lacks experience in court procedures. That is, if it is possible for him to form such an opinion, the psychiatrist is requested to express an opinion whether, by reason of insanity or other mental incompetence, this defendant would encounter difficulty more severe, under such circumstances, than the difficulty which would be encountered by a person, otherwise comparable in intelligence, training, and experience, who is not insane or otherwise mentally incompetent.

The psychiatric examination is to be conducted by Dr. David Kasuboski, Mental Health Associates, 20 South Park Street, Suite 403, Madison, Wisconsin, at 10:30 a.m. on Tuesday, November 11, 1980.

Defendant is ordered to report to Suite 403, 20 South Park Street, Madison, Wisconsin, at 10:30 a.m. on Tuesday, November 11, 1980, for the purpose of such an examination.

Dr. Kasuboski's report is to be placed in the mail to me at Box 591, Madison, Wisconsin 53701, not later than November 18, 1980.

Entered this 4th day of November, 1980.

BY THE COURT:

/s/ James E. Doyle

District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	80-CR-42
VICTOR SCHROEDER, Defendant.	)	

ORDER

On November 4, 1980, I entered an order requiring the defendant to report on November 11, 1980, for a psychiatric examination by Dr. David Kasuboski, and defining the questions upon which Dr. Kasuboski's opinion is sought. By inadvertence, a copy of that order was not furnished to Dr. Kasuboski. I regret the inconvenience to the defendant and to the doctor which resulted from this inadvertence.

Defendant is hereby ordered to report to Suite 403, 20 South Park Street, Madison, Wisconsin, at 10:30 a.m. on December 2, 1980, for an examination by Dr. Kasuboski. The purpose of the examination is that set forth in my order of November 4, 1980. Dr. Kasuboski's report is to be placed in the mail to me at Box 591, Madison, Wisconsin, 53701, not later than December 9, 1980.

Copies of today's order and of my order of November 4, 1980 are to be mailed today by the clerk of court to the defendant, to the United States Attorney, to Dr. Kasuboski, to the United States Marshal for this district, and to the United States Probation Office for this district.

Entered this 12th day of November, 1980.

BY THE COURT:

/s/ James E. Doyle
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	80-CR-42
VICTOR SCHROEDER, Defendant.	)	

ORDER

The court has received today from David A. Kasuboski, M.D., a psychiatrist, a report dated December 2, 1980, concerning his evaluation of the defendant on that day. The clerk of court is directed to mail a copy of Dr. Kasuboski's report to the United States Attorney and a copy to the defendant, together with copies of this present order. The clerk is directed to seal the original of Dr. Kasuboski's report and to place it in the clerk's file in an envelope bearing a description of its contents as Dr. Kasuboski's report of December 2, 1980, and an instruction that it is to be opened only upon the order of a United States judge or United States magistrate.

Upon the basis of Dr. Kasuboski's report, upon the basis of my own observations of the defendant, and upon the basis of the entire record in this case, I find that the defendant is not presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense. I also find that this defendant would encounter difficulty in defending himself in this case without the assistance of a

person licensed to practice law, no more severe than the difficulty which would be encountered by any person, otherwise comparable in intelligence, training, and experience, who is not insane or otherwise mentally incompetent.

The clerk of court is ordered to schedule this case for trial by jury on a date in the first half of January, 1981.

Entered this 8th day of December, 1980.

BY THE COURT:

/s/ James E. Doyle
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	80-CR-42
VICTOR SCHROEDER, Defendant.	)	

FINAL PRETRIAL CONFERENCE ORDER

A final pretrial conference was held on December 23, 1980 before District Judge James E. Doyle. Grant Johnson, Assistant United States Attorney, appeared for the plaintiff. The defendant appeared in person, without an attorney.

Trial to a jury will commence on Monday, January 5, 1981, at 9:00 a.m., with the selection of a twelve-member jury and two alternate jurors. I will conduct the questioning of the prospective jurors, in approximately the following manner.

A total of 32 prospective jurors will be called forward and will be seated in the order in which they are called. Although the chairs will not actually be numbered, the first juror called will be seated in a chair considered to be number one, the second in a chair considered to be number two, and so on. A list of the prospective jurors will be provided so that the plaintiff and the defendant can prepare a seating chart, as the jurors are called forward, showing which juror is in which chair.

I will read the first count of the indictment and explain that the second and third counts are similar but involve applications at other times to other lending institutions. I will explain that the trial will proceed on January 5, 1981, after the jury has been chosen, and that it will continue each day until it has been completed, except that because of other matters in the court, the trial of this case cannot be held on Wednesday, January 7, 1981.

I will ask whether any of the prospective jurors has ever heard of the case previously. If so, I will inquire into how the juror has heard of it, and the nature of information heard.

I will instruct the prospective jurors as follows:

Presumption of Innocence

A defendant in a criminal case is presumed by law to be innocent. That presumption remains with him throughout the trial unless and until he is proven guilty of the crime charged by credible evidence beyond a reasonable doubt.

Burden of Proof

The burden of proving defendant guilty beyond a reasonable doubt rests upon the government. This burden never shifts throughout the trial. The law

does not require a defendant to prove his innocence or to produce any evidence. He may rely upon evidence brought out on cross examination of witnesses for the government. If the government fails to prove defendant guilty beyond a reasonable doubt the jury must acquit him.

Indictment

The indictment is not evidence of defendant's guilt. It is merely the formal manner by which the Government accuses a person of a crime in order to bring him to trial. The jury must not be prejudiced against a defendant because an indictment has been returned against him.

Each juror will be requested to rise, in the order in which each was called forward, and to state his or her name, address, and occupation; also the occupation of the juror's spouse, if married. Also, if the juror or his or her spouse is retired, the juror will state what the previous occupation was.

I will introduce the attorney for the plaintiff and introduce the defendant, and I will inquire whether the prospective jurors or members of their immediate families know either the defendant or the attorney for the plaintiff or any member of the immediate family of the defendant or the attorney for the plaintiff. If so, I will inquire further into the relationship.

I will ask the prospective jurors the following questions:

1. Have any of the members of the jury ever defaulted on a loan from a financial institution? If so, did the financial institution make any attempt to collect on the indebtedness? If so, do you feel any hostility or ill will towards financial institutions or employees of financial institutions as a result of this instance?

2. Is any one of you or, so far as you know, is anyone in your immediate family a member of any of the following organizations?

(a) The American Legion?

(b) The American Civil Liberties Union?

(c) The Posse Comitatus?

(d) The Anti-Defamation League?

(e) The League of Women Voters?

(f) The Life Science Christian Church?

(g) The Committee for an Effective Congress?

(h) The National Association for the Advancement of Colored People?

3. A defendant in a criminal case is entitled to be represented by an attorney who is licensed to practice law. A defendant in a criminal case is also entitled to conduct his defense himself without an attorney. If a defendant desires to be represented by an attorney who is licensed to practice law, he may retain such an attorney privately, with the attorney being compensated by the defendant out of the defendant's funds. If a defendant desires to be represented by an attorney who is licensed to practice law, but if the defendant is unable to afford to hire such an attorney, the defendant may ask the court to appoint such an attorney to represent him. The court will grant this request and appoint such an attorney if the defendant makes a proper showing of his financial inability to hire such an attorney. These things have been explained to this defendant. He has advised the court that he does not intend to hire with his own money any attorney who is licensed to practice law, and that he will not accept the assistance of any attorney whom the court might appoint

if that attorney is licensed to practice law. Defendant has said that he desires to be represented by what he calls his counsel of choice or counsel of confidence. He has not identified any specific person who would qualify as a counsel of choice or counsel of confidence, but he has made it clear that any such person would be a person who is not licensed to practice law. I have informed the defendant that he may not have the assistance of an attorney who is not licensed to practice law. The indictment in this case was returned on July 29, 1980. I have refused to permit the trial to be delayed any longer. The defendant is appearing without an attorney, but under protest that he is being denied counsel of choice or counsel of confidence. The question is: Is there anyone of you who feels that he or she would be unable to serve as a fair and impartial juror because of any sympathy for or hostility toward the government, or because of any sympathy for or hostility toward the defendant, by reason of the fact that he is appearing without an attorney under the circumstances I have just described?

4. Is there any of you who has previously served as a member of a trial jury in this court or in any other court? If any juror answers "yes," I will describe the earlier case to the defendant and to the attorney for the plaintiff.

5. Does any of you know of any reason whatever why you cannot serve impartially in this case and fairly weigh the evidence and render a true and just verdict according to the evidence and according to the law as I will explain it to you at the end of the trial?

I will ask the defendant and the attorney for the government whether there are any further questions they wish put to the prospective jurors. If so, I will decide whether to grant the request and to ask the question.

If any answer to any question is such that the particular prospective juror should not sit in this case, I will excuse that juror and another prospective juror will be called forward and questioned.

When I have completed the questioning of the prospective jurors, the parties will have the opportunity to exercise their peremptory challenges. A list will be handed to the attorney for the government and then to the defendant, seven times. That list will show the 32 prospective jurors in the order in which they have been called and seated. On each of the first six rounds, the attorney for the government will be permitted to strike the name of one prospective juror from among jurors numbered 1 through 28. On each of the first and sixth rounds, the defendant will be permitted to strike one name, and on each of the second, third, fourth, and fifth rounds, two names, from among jurors numbered 1 through 28. The twelve survivors from among jurors numbered 1 through 28 will constitute the jury. On a seventh round the government will strike one name and the defendant one name from among jurors numbered 29 through 32. Of the two survivors among those four, the one seated in the lowest numbered chair will be the first alternate, and the other will be the second alternate.

When the jury has been chosen and sworn, the attorney for the United States will be permitted to make an opening statement, describing what he expects the evidence will be. The defendant will then be permitted to make an opening statement describing what he expects the evidence to be. However, if he prefers, the defendant may reserve his right to make an opening statement until after the United States has presented its case.

When the opening statement or statements have been completed, the government will have the opportunity to

present its evidence through the testimony of witnesses and through documents. The defendant will then have the opportunity to present his evidence through the testimony of witnesses and through documents. The United States will then have the opportunity to present rebuttal evidence. The defendant will have the opportunity to rebut the government's rebuttal evidence.

If either party desires to request instructions on the law to be given the jury by me at the close of the case, those requested instructions must be written out and served on the opposing party and filed with the clerk of court by 4:30 p.m. on Monday, January 5, 1981.

Entered this 30th day of December, 1980.

BY THE COURT:

/s/ James E. Doyle
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	80-CR-42
VICTOR SCHROEDER,	)	
Defendant.	)	

VERDICT

Count I

We, the jury in the above-entitled cause, find the defendant, VICTOR SCHROEDER,

Guilty

of the offense charged in Count I in the Indictment returned against him.

Count II

We, the jury in the above-entitled cause, find the defendant, VICTOR SCHROEDER,

Guilty

of the offense charged in Count II in the Indictment returned against him.

Count III

We, the jury in the above-entitled cause, find the defendant, VICTOR SCHROEDER,

Guilty

of the offense charged in Count III in the Indictment returned against him.

/s/ Virginia J. Sybers
Forewoman or Foreman

Madison, Wisconsin

Dated: January 9, 1981.

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff,	)	
	)	Case No.
v.	)	
	)	80-CR-42
VICTOR SCHROEDER, Defendant.	)	

MOTION TO STRIKE OR DISREGARD PORTIONS OF THE PRESENTENCE INVESTIGATION

The defendant, Victor Schroeder, by his attorney, Earl Munson, Jr., hereby moves the court to strike or disregard the letter of Raymond R. Herje, U. S. Probation Officer, dated March 10, 1981, the enclosures therein and all references in the presentence investigation report referring to defendant's alleged affiliation with the posse comitatus. Defendant states the grounds for such motion as follows:

1. Mr. Herje's letter attaches copies of a letter from Bruce C. Thompson dated March 4, 1981 and a court order dated May 30, 1980. Unfortunately, we know none of the circumstances surrounding the issuance of that order including whether it was premised upon the actions of Victor Schroeder or the actions of the other defendants, DuWayne Schroeder, Sharon Schroeder and Dale Schroeder. Inasmuch as the defendants appeared without counsel we do not know if there was any evidentiary hearing to support the order. Mr. Thompson's statement that "the Schroeders" were interfering with rental and that Mr. Hartman backed out after "the Schroeders" let it

be known there would be problems is hardly the type of information which should be used for sentencing a defendant. What motivated Mr. Hartman to not rent the land may or may not be what Mr. Hartman said was the reason. It is significant that Mr. Thompson justifies his low rental figure because of the Schroeders' conduct, but does not indicate in any way, shape or manner that "the Schroeders" or the defendant, Victor Schroeder, in any way interfered with or created "problems" for the tenant on the property.

2. This sort of innuendo and guilt by association is apparent in the presentence investigation. The presentence investigator takes pains to identify Mr. Schroeder with the posse comitatus despite Mr. Schroeder's denial that he is a member. The investigator does so by pointing out that Mr. Schroeder's friends are members of the posse comitatus and then he establishes that the posse comitatus is an anti-social organization because one of its members was recently convicted of a crime and sentenced to seven years because of confrontational activities. Significant by its absence is any indication that Victor Schroeder engaged in any improper activities or any support whatsoever of improper activities. Whether or not the posse comitatus is a socially desirable organization is not something that should be decided in this proceeding, yet the presentence investigator assumes that any person who is a member of the posse comitatus or associates with members of the posse comitatus is thereby a better candidate for prison than someone who does not associate with them. That has all the earmarks of a witch-hunt and is no more appropriate for a presentence investigator than it was for a United States senator conducting an investigation in the 1950s. Substitute communist party for posse comitatus and the entire Civil Liberties Union would descend on this Court.

3. Typical of the above innuendo is the presentence investigator's statement that people feel intimidated by the Schroeders and then it states, "defendant denies . . . all claims of intimidation." There are no "claims of intimidation" recited in the report. One may feel intimidated by motorcycle gangs, but that does not give another person the right to say in the next breath that Mr. "X" denies any claims of intimidation. That is guilt by association and inference which is beneath the status of a federal presentence investigation.

4. Another example of the foregoing is the presentence investigator's use of the word "victims." In the context of a criminal case, it is hardly appropriate to label every creditor of Mr. Schroeder a "victim." If so, every bankrupt has victimized his creditors.

Dated at Madison, Wisconsin this 17th day of March, 1981.

/s/ *Earl Munson, Jr.*

Earl Munson, Jr.
Attorney for Defendant

Earl Munson, Jr.
LaFollette, Sinykin, Anderson
& Munson
Suite 300
222 West Washington Avenue
Madison, WI 53703
(608) 257-3911

Statutes

Title 18 U. S. Code, section 1014:

"Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank system, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

Title 28 U. S. Code, section 1254 (a)(1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree".

Title 28 U. S. Code, section 1651(a):

"The Supreme Court . . . may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."